BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE MANUEL ARMENTA Claimant VS. **ALEX R. MASSON, INC.** Respondent AND **FLORIST MUTUAL INS. CO.** Insurance Carrier	)	Docket Nos. 1,032,311 & 1,032,312

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 18, 2007, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. C. Albert Herdoiza of Kansas City, Kansas, appeared for claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that claimant had failed to provide timely written claim and, therefore, denied his request for medical treatment. However, the ALJ failed to make any findings concerning claimant's date or dates of accident, whether claimant suffered a series of accidents or just a single traumatic injury, whether claimant's right knee injury was a natural consequence of the left knee injury or the result of a separate accident or series of accidents, whether claimant's right knee injury arose out of and in the course of his employment with respondent, and whether claimant suffered any intervening accidents or injuries to either knee. Therefore, on appeal, those issues cannot be addressed except to the extent necessary to decide the timely written claim issue.[1]

[1] K.S.A. 2006 Supp. 44-551(i)(2)(A) and K.S.A. 2006 Supp. 44-555c(a).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 17, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that he did not make timely written claim. Claimant argues that he continued to suffer injuries each and every day he continued to work. He argues his last day worked was November 12, 2006, and, therefore, written claim made on December 14, 2006, was timely.

Respondent argues that claimant was injured in July 2002 and received medical treatment through May 23, 2003. According to respondent, the medical treatment received by claimant after May 23, 2003, was treatment for a new injury. Respondent admits it did not file an employer's report of accident with the Division, so claimant had one year after the last authorized medical care to make a written claim. The time for filing a written claim expired on May 23, 2004. Since it was stipulated at the preliminary hearing that a written claim was not made until December 14, 2006, respondent argues the ALJ's denial of benefits should be affirmed.

The issue for the Board's review is: Did claimant provide timely written claim?

FINDINGS OF FACT

Claimant began working for respondent on June 29, 1999. His job consisted primarily of lifting bags of dirt. In July 2002, while pushing a wheelbarrow, he was struck on his left knee by a piece of metal. Respondent has stipulated to the July 2002 injury. Claimant reported the injury to respondent and was provided medical treatment. Dr. Kenneth Wertzberger performed surgery on his left knee on August 14, 2002. Claimant returned to work after the surgery but said he continued to have symptoms, including swelling in his left knee.

Dr. Wertzberger continued to follow up with claimant and on May 23, 2003, he released claimant to full duty but instructed claimant to return in a couple of months for a recheck. As for claimant's ongoing symptoms, he stated he had no other solution than to continue claimant on anti-inflammatories. He wrote claimant on that date, telling him that during surgery there was a torn cartilage but there was also arthritis. Dr. Wertzberger recommended that claimant continue taking anti-inflammatories and return when he gets to the point that the medicine does not relieve his pain. Dr. Wertzberger wrote a letter to respondent's insurance carrier on June 30, 2003, stating that claimant comes in frequently

with continued pain and swelling in his knee and that he had not reached maximum medical improvement.

Dr. Wertzberger next saw claimant on August 23, 2005. Claimant gave him a history of having recently hit his left knee with a metal object. He also complained to Dr. Wertzberger that his left knee has been hurting him all along but that he could not take off work because he is the only one in his family with a job.

In approximately February 2006, claimant started having problems with his right knee caused by the weight of his work. It is not clear whether he sought treatment from respondent for his right knee, but no treatment was authorized.

Claimant returned to Dr. Wertzberger on September 18, 2006. He reported his left knee pain had gotten better but he had developed intermittent numbness in that knee over the last couple of months. Dr. Wertzberger prescribed anti-inflammatory medicine and a knee brace.

Claimant saw Dr. Edward Prostic on March 27, 2007, at the request of his attorney. Dr. Prostic examined both claimant's knees and opined that claimant suffered injury to his left knee during the course of his employment with respondent. Claimant has gone on to suffer two-compartment osteoarthritis of that knee. While favoring his left knee, claimant accelerated the osteoarthritic changes in his right knee. Dr. Prostic opined that claimant will need total knee replacement arthroplasty in the not-too-distant future.

Claimant was examined by Dr. Roger Hood on May 15, 2007, at the request of respondent. Dr. Hood believes that claimant's current problems are a progression of his underlying arthritis. He did not believe that claimant's right knee sustained any specific injury but thinks claimant has a genetic predisposition for arthritis in his knees. He does not think claimant's arthritis was significantly aggravated or accelerated by his on-the-job injury.

Claimant's last day working at respondent was November 12, 2006. He is currently working at McDonald's. He is claiming two injuries, the first being from August 14, 2002, and each and every working day through November 12, 2006, and a second accident on February 2006 and each and every working day through November 12, 2006. For purposes of the preliminary hearing, respondent stipulated that claimant sustained an injury to his left knee in July 2002. Respondent denies claimant suffered a series of accidents up to his last day worked. The parties have stipulated that claimant first gave respondent written claim on December 14, 2006.

In Docket No. 1,032,311, claimant's E-1 dated December 8, 2006, filed with the Division of Workers Compensation on December 15, 2006, alleges injuries to his "left lower extremity with resulting injury to right lower extremi[ty] with other areas to be determined"

resulting from "a series of injuries beginning on or about August 14, 2002, and continuing everyday thereafter with resulting injury to the right lower extre[mity]."

In Docket No. 1,032,312, claimant's E-1 dated December 8, 2006, filed with the Division of Workers Compensation on December 15, 2006, alleges injuries to "both lower extremities with other areas to be determined" resulting from a "series of injuries beginning on or about February 2006 and continuing everyday thereafter."

PRINCIPLES OF LAW

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-557 states in part:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
>
> . . . .
>
> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

A written claim for compensation need not take on any particular form, so long as it is, in fact, a claim.[2] Furnishing medical care to an injured employee is the equivalent of an employer paying compensation under the Act.[3] In determining whether medical care is compensation under the Act, the question is whether the medical care was authorized by the employer, either expressly or by reasonable implication.[4] If an employer is on notice that an employee is seeking treatment on the assumption that treatment is authorized by the employer, the employer is under a duty to disabuse the employee of that assumption if the employer expects the 200-day or 1-year limitation to take effect.[5]

"When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits."[6]

"The secondary injury rule allows a claimant to receive compensation for all of the natural consequences arising out of an injury, including any new and distinct injuries that are the direct and natural result of the primary injury."[7]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[8] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[9] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[10] When a primary injury is shown to arise out of and in the course of employment, every natural consequence

---

[2] *Lawrence v. Cobler*, 22 Kan. App. 2d 291, 294, 915 P.2d 157, *rev. denied* 260 Kan. 994 (1996).

[3] *Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App. 2d 383, Syl. ¶ 1, 642 P.2d 574 (1982).

[4] *Id.* at Syl. ¶ 2.

[5] *Shields v. J.E. Dunn Constr. Co.*, 24 Kan. App. 2d 382, 385-86, 946 P.2d 94 (1997).

[6] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 3, 128 P.3d 430 (2006).

[7] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 515, 154 P.3d 494 (2007).

[8] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[9] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[10] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 3, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

flowing from that injury, including new and distinct injuries, are compensable so long as they are the direct and natural consequence of the primary injury.[11]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

Claimant received authorized medical treatment from Dr. Wertzberger. On May 23, 2003, Dr. Wertzberger released claimant to full duty and advised claimant to continue with anti-inflammatory medication and to return in a couple of months for a recheck. Dr. Wertzberger wrote to respondent's insurance carrier on June 30, 2003, and said that claimant had not reached maximum medical improvement and would need to be followed for a few more months. Although claimant did not return to Dr. Wertzberger until August 23, 2005, claimant had never been disabused of his belief by either respondent or its insurance carrier that Dr. Wertzberger continued to be his authorized physician. On October 7, 2005, claimant was again released to full duty work by Dr. Wertzberger and told to return "as needed if this knee flares up again."[14] Claimant was last seen by Dr. Wertzberger on September 18, 2006. Although all of the authorized treatment appears to have been provided for claimant's left knee, the right knee condition appears to have developed as a direct and natural consequence of the left knee injury. Therefore, it is not a new and separate injury and does not require a separate written claim for compensation.

CONCLUSION

Claimant's written claim for compensation on December 14, 2006, was within one year of the last authorized medical treatment and, therefore, it was timely made.

---

[11] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[12] K.S.A. 44-534a.

[13] K.S.A. 2006 Supp. 44-555c(k).

[14] P.H. Trans., Resp. Ex. B at 1.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated July 18, 2007, is reversed.

IT IS SO ORDERED.

Dated this _____ day of October, 2007.

_____
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge